Adtranz, ABB Daimler-Benz Transportation, N.A., Inc. *and* International Association of Machinists and Aerospace Workers. Cases 32–CA–17172, 32–RM–759, and 32–RC–4540

May 31, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On January 31, 2000, Administrative Law Judge Jay R. Pollack issued the attached decision. Both the General Counsel and the Respondent filed exceptions and supporting briefs. The Charging Party joined the exceptions and brief filed by the General Counsel. The Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Adtranz, ABB Daimler-Benz Transportation, N.A., Inc., Pittsburg, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Amend the employee handbook by rescinding the unlawful overly broad rules regarding solicitation, distribution, and abusive language."

2. Substitute the following for newly relettered paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its Pittsburg, California facility, and at all other facilities where the Respondent's rules concerning solicitation, distribution, and abusive language have been maintained, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 1998."

3. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain a rule prohibiting abusive language without making clear that such rules are not intended to bar lawful union organizing propaganda.

WE WILL NOT maintain solicitation and distribution rules which interfere with union activities by requiring prior approval by the Employer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL amend our employee handbook by rescinding our unlawful overly broad rules regarding solicitation, distribution, and abusive language.

ADTRANZ, ABB DAIMLER-BENZ
TRANSPORTATION, N.A., INC.

George Velastegui, Esq., for the General Counsel.
Mark S. Ross and *Joshua M. Henderson Esqs. (Seyfarth, Shaw, Fairweather & Geraldson*), of San Francisco, California, for the Respondent.
David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

[1] No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent maintained an unlawful rule regarding employee use of electronic mail.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] We shall modify the judge's recommended Order to require that the Respondent: (1) amend its employee handbook by rescinding its unlawful overly broad rules restricting solicitation, distribution, and abusive language; and (2) post the attached notice at all its facilities where those rules have been maintained. The latter remedy is appropriate in light of the judge's finding, to which the Respondent has not excepted, that the Respondent's employee handbook setting forth the unlawful rules covers all its facilities nationwide. See, e.g., *Raley's, Inc.,* 311 NLRB 1244 fn. 2 (1993).

Member Brame would find that the Respondent's rule against abusive language does not violate Sec. 8(a)(1). See his dissenting position in *Flamingo Hilton-Laughlin*, 330 NLRB 287 fn. 3 (1999).

In sec. II, B of his decision, the judge stated that the Board found in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), that a rule against "[m]aking false, vicious, profane or malicious statements" was lawful. The Board majority in *Lafayette Park* found that the rule was unlawful. Id., at 828.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on July 19 and 20, 1999. On December 23, 1998, Machinists District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the charge in Case 32–CA–17172 alleging that Adtranz ABB Daimler-Benz Transportation N.A., Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Union filed an amended charge on February 26, 1999. On March 18, 1999, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

On October 2, 1998, the Employer filed a representation petition in Case 32–RM–759 seeking a Board-conducted election to determine whether its production and maintenance employees at its Pittsburg, California facility, wished to be represented by the Union. On November 5, 1998, the Union filed a petition in Case 32–RC–17172 seeking to represent Respondent's employees at the Pittsburg, California facility. An election was held on December 9, 1998. The results of the election were 79 votes cast for representation by the Union and 135 votes against representation. There were also 22 challenged ballots. The challenged ballots were insufficient in number to affect the results of the election. The Union filed timely objections to the election. On March 19, 1999, the Regional Director issued a report on objections, order consolidating cases, and notice of hearing. The hearing on the Union's objections was consolidated with the unfair labor practices hearing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Delaware corporation with offices and a principal place of business located in Pittsburg, California, where it is engaged in the refurbishing of light rail vehicles. During the 12 months prior to the issuance of the complaint, Respondent purchased and received products valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

At its Pittsburg, California facility, Respondent is engaged in refurbishing rail cars for the Bay Area Rapid Transit District (BART). The Employer learned of the Union's organizing campaign in September 1998. Respondent was asked by certain local politicians to submit to a card check to see if its employees working on BART cars desired union representation. Rather than submit to a card check, on October 2, 1998, the Employer filed a petition with the Board, seeking a Board-conducted election. While the Employer's petition was pending, the Union filed its petition on November 5, 1998. On November 9 the parties agreed to an election to be held on December 9, 1998. Prior to the December 9 election, during October, November, and December, Respondent held meetings with employees to discuss the Union and the upcoming election.

The General Counsel contends that during meetings with employees, Respondent informed employees that in order to qualify for the Respondent's employee incentive plan (a companywide bonus program) the employees would have to meet certain "new requirements," including attending "anti-Union" meetings "disguised as mandatory training sessions," making suggestions under a "Quality Improvement Program," and/or participating in a work committee. The General Counsel contends that the requirement for the bonus programs were changed in retaliation for its employees' union activities. Respondent contends that the requirements were part of a companywide plan and were the same requirements as had been in place for 1997. Further, the Employer contends that the meetings alleged to be antiunion meetings were not mandatory training sessions. The Employer admits that it did permit employees to use time spent at meetings in which the Union was discussed as the equivalent of training hours for meeting the bonus requirements.

In addition to the allegations regarding the bonus program, the General Counsel alleges that certain paragraphs of Respondent's employee handbook unlawfully interfere with the employees' exercise of their Section 7 rights. The General Counsel does not contend that the rules were initiated in response to any union and/or protected concerted activity or that any employee has been disciplined under the rules for engaging in union and/or protected concerted activity. The General Counsel's theory of the violation is that by maintaining the rules the Respondent has violated and continues to violate Section 8(a)(1) because the rules interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

B. Facts and Preliminary Conclusions

Solicitation and distribution

In December 1997, Respondent distributed a new employee handbook to its employees in Pittsburg, California, containing work rules and policies covering all its facilities nationwide. The handbook contained, inter alia, the following provisions:

> The following are examples of actions that are considered extremely serious misconduct and which may result in immediate termination of employment:
>
> . . . Soliciting or distributing without authorization.
>
> The following are examples of actions that are considered serious misconduct. The first offense may result in suspension without pay. A second offense, not necessarily of the same nature may result in termination of employment.

> . . . Using abusive . . . language to anyone on company premises.

Solicitation and/or Distribution:

> The unauthorized sale of tickets, solicitation of contributions, or distribution of handbills can disrupt work. Therefore, such activities are not permitted on company premises *during working time* except for specific company-sponsored solicitations or distributions.
>
> Unauthorized activities include, but are not limited to, distribution of any literature or any material in work areas and solicitation in either work or nonwork areas where either the employee soliciting or the employee being solicited is scheduled to be working.
>
> *All solicitation requests must be approved in advance by Human Resources.*

It is Respondent's practice to distribute copies of the handbook to new employees at the commencement of employment. The rules set forth above apply to all of Respondent's facilities in the United States.

Respondent's rules specifically require employees to obtain prior authorization before engaging in soliciting and distribution. Both rules fail to limit or define the kinds of solicitations and or distribution that require prior management approval.

A no-solicitation rule is unlawful if it unduly restricts the organization activities of employees during periods and in places where these activities do not interfere with the Employer's operations. *Our Way, Inc*., 268 NLRB 394 (1983); *Laidlaw Transit, Inc*., 315 NLRB 79, 82 (1994). For example, rules which prohibit employees' union activities, including solicitation to sign union authorization cards, on breaktimes or mealtimes are overly restrictive of employees' Section 7 rights to self-organization, and are unlawful. Rules which require employees to get prior approval from the employer for solicitations are also overly restrictive of employee rights, and are unlawful. *Opryland Hotel,* 323 NLRB 723, 728 (1997); *Baldor Electric Co.,* 245 NLRB 614 (1979).

Abusive language

Respondent's rule against "abusive or threatening language to anyone on Company premises" does not define abusive language. Thus, the General Counsel argues that "the rule could reasonably be interpreted as barring lawful union organizing propaganda or rhetoric."

In *Linn v. United Plant Guards*, 383 U.S. 53 (1966), the U.S. Supreme Court held that propaganda during a union campaign is protected and does not lose the protection of the Act even when it includes "intemperate, abusive, and inaccurate statements." In *Great Lakes Steel*, 236 NLRB 1033, 1036–1037 (1978), the Board held that a rule prohibiting distribution of literature which was "libelous, defamatory, scurrilous, abusive or insulting, or any literature which would tend to disrupt order, discipline or production within the plant" was unlawful. The rule was held to unlawfully inhibit Section 7 activity.

However, in *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board found that a rule against "making false, vicious, profane or malicious statements toward or concerning the [employer] or any of its employees" was lawful. Thereafter, in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the Board held that a rule prohibiting the use of "loud, abusive or foul language" violated the Act because it did not define abusive or foul language. The Board found that the rule could reasonably be interpreted as barring lawful union organizing propaganda.

In the instant case, the rules do not define abusive language or conduct. Therefore, under *Flamingo Hilton-Laughlin*, the rules could reasonably be interpreted as barring lawful union organizing propaganda.

The E-mail rule

Employees in various jobs at the Pittsburg facility, including certain classifications covered by the election petition, use Respondent's computers in their work duties. Inspectors, technicians, leadmen, supply employees, planners, and engineers use computers during their workday. These employees have access to Respondent's intranet E-mail system. Respondent's E-mail system also includes an instant message function that permits real-time communication through the E-mail system. Employees use this interactive E-mail system to communicate with nonemployees through the internet. Apparently, employees send and receive personal (nonwork related) communications through the E-mail system, notwithstanding Respondent's rules.

Use of Hardware/Software and Electronic Systems:

> Employees may use hardware/software and electronic corporate mail systems provided by the company *for business use only.* The company reserves the right to access and inspect file contents within the file storage and messaging systems to insure the systems are not being misused. Where required for business purposes, the company may access and inspect either the file storage system or the message system and review, copy, or delete any files or messages and disclose the information in both systems to others.

Respondent's E-mail rule raises a novel legal issue. However, examination of cases involving the use of employer bulletin boards and telephones provides useful principles.

It is well established that there is no statutory right of an employee or a union to use an employer's bulletin board. *Honeywell, Inc.,* 262 NLRB 1402 (1982); *Container Corp.,* 244 NLRB 318 (1979). An employer has a right to restrict the use of company bulletin boards. However, that right may not be exercised discriminatorily so as to restrict postings of union materials. *J. C. Penny, Inc.*, 322 NLRB 238 (1996); *Guardian Industries Corp.,* 313 NLRB 1275 (1994).

Similarly, there is no statutory right of an employee or a union to use an employer's telephone for personal or nonbusiness purposes. However, once an employer grants the privilege of occasional personal use of the telephone during worktime, it may not lawfully exclude union activities as a subject of discussion. *Union Carbide Corp.*, 259 NLRB 974 (1981). See also *K-Mart Corp.*, 255 NLRB 922 (1981).

Analogously, Respondent could bar its computers and E-mail system to any personal use by employees. In this case, Respondent did permit E-mails of a personal nature, notwithstanding its rule. Therefore, Respondent could not exclude the union as a topic of discussion. However, there is no evidence that Respondent prohibited union discussions on its E-mail system. The rule was not strictly enforced as to personal discussions and, I find, it would be improper to presume that union discussions would be treated differently. Accordingly, I find that Respondent's E-mail rule is valid and that the General Counsel has not established that the rule was discriminatorily applied.

Respondent's earned incentive plan

In late 1997, Respondent instituted an earned incentive plan (EIP) where employees were eligible to receive an annual bonus if

they met certain requirements. Specifically, the EIP required employees to fulfill the following criteria to qualify for an annual bonus: (1) completion of at least 20 hours of training per year in company sponsored/management approved programs; (2) an employee's participation on at least one of the Employer's various teams or their submission of at least two "Quality Improvement Program" suggestions (QIPs); and (3) a timely and satisfactory performance evaluation.

The evidence shows that in 1997 some of the requirements were waived because the program was new and employees did not have sufficient time to fulfill all the requirements. The 20 hour training requirement was waived and the QIPs and team participation requirement was waived for some employees. All otherwise eligible employees received the 1997 EIP bonus in March 1998—even though most of them did not satisfy the 20 hour training requirement.

The EIP remained in effect in 1998. Respondent's management announced the continuation of this program at employee meetings. Respondent also posted an announcement of the plan and the plan requirements on company bulletin boards. In 1998 the requirements for the EIP were enforced.

Respondent had hired a large number of new employees in late 1998. It would have been difficult for these employees to fulfill the requirements of the EIP. Further, Respondent beginning in mid-November and continuing to the representation election, held election campaign meetings among the employees. These meetings took time and effort away from training and other company programs. As a result, many employees would not have satisfied the training requirement of the EIP. Thus, Respondent permitted employees to accumulate time spent at representation election campaign meetings towards the 20 hours of training requirement of the EIP. At no time, however, was employee participation in these campaign meetings mandatory. Nor were employees ever told that they would have to attend the Employer's campaign meetings in order to qualify for the EIP bonus. Finally, I note that because certain production and profit goals were not met, none of Respondent's employees at any of its facilities nationwide received an EIP bonus for 1998.

In deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering, Inc.,* 253 NLRB 419, 421 (1980). The Board does not automatically find the granting of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectional "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp*., 248 NLRB 748 (1980); *Honolulu Sporting Goods*, 239 NLRB 1277 (1979). However, the withholding of new benefits from employees who are awaiting a Board election also violates the Act if the employees otherwise would have been granted the increases in the normal course of the Employer's business. *Progressive Supermarkets*, 259 NLRB 512 (1981). An employer is obligated to give any increase or benefit decided on, or any regular, normal increase that would come due during the critical period, but should not put into effect any increase not already decided on before the union came on the scene.

The more prudent course, the one least likely to result in a violation, is to refrain from giving the wage increases during the critical period, for at the very least the General Counsel would have the burden of showing the normalcy of the increase, or that it had been decided on prior to the advent of the union. *Liberty Telephone,* 204 NLRB 317, 322 (1973). Where employees are told *expected* benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference, the Board will not find a violation. *Truss-Span Co.*, 236 NLRB 50 (1978). However, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. *Liberty House Nursing Home*, 236 NLRB 456 (1978).

In the instant case, Respondent continued the EIP, an existing benefit plan, after the representation petition was filed. The General Counsel contends that by counting time spent at campaign meetings as training, Respondent changed the benefit plan. However, I find that Respondent acted consistently with its past practice. In 1997, long before the union organizing effort, Respondent eased the training requirements for qualification so as to allow employees hired in the fall to qualify for the EIP program. Participation in the campaign meetings was not necessary to qualify for the EIP program. Accordingly, I find that Respondent did not violate the Act in administering its EIP program.

The representation proceeding

Having concluded that Respondent, between the date of the petition and the date of the election, maintained a rule prohibiting abusive language without making clear that the rule did not have bar lawful union activity and maintained a rule which required prior approval of union solicitation and distribution, I find that Respondent's acts constitute objectionable conduct which interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. *American Safety Equipment*, 234 NLRB 501 (1978*); Dayton Tire & Rubber*, 234 NLRB 504 (1978). I, therefore, recommend that the election be set aside.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by maintaining a rule prohibiting abusive language without making clear that such rules are not intended to bar lawful union organizing propaganda.
4. Respondent violated the act by maintaining solicitation and distribution rules which interfered with union activities by requiring prior approval by the Employer.
5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. By the conduct set forth in conclusions of law 3 and 4 above, Respondent has illegally interfered with the representation election conducted by the Board in Cases 32–RM–759 and 32–RC–4540.

On the findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

[2] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Adtranz, ABB Daimler-Benz Transportation N.A., Inc., Pittsburg, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule prohibiting abusive language without making clear that such rules are not intended to bar lawful union organizing propaganda.

(b) Maintaining solicitation and distribution rules which interfered with union activities, by requiring prior approval by the Employer.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Regional Director, post at its Pittsburg, California facilities, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by authorized representative of Respondent, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since June 23, 1998.

(b) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official of Respondent on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 32 shall set aside the representation election in Cases 32–RM–759 and 32–RC–4540.

Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."